No. 11,402

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAUL SAMUEL, WALTER SAMUEL, SAM BROWN and MURRAY SCHUTZ,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

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Pursuant to the order of this Court of September 19, 1947, setting aside the prior submission of this cause, and in accord with the permission therein contained to file supplemental briefs, the appellee will further consider two questions:

1. Whether the instruction given the jury by the trial Court on the subject of circumstantial evidence constitutes reversible error; and

2. Whether the instruction given the jury upon the subject of price regulation constitutes reversible error.

I.

PROPER INSTRUCTIONS WERE GIVEN ON THE SUBJECT OF CIRCUMSTANTIAL EVIDENCE.

In the Court below the appellant Schutz requested the following instruction, set forth at page 31 of the transcript:

> "Defendant Schutz's Requested Instruction No. 5.
>
> Subject:
>
> Circumstantial Evidence—Two Hypotheses.
>
> In a case where the prosecution seeks to establish a crime against a defendant by circumstantial evidence, such evidence must be not only consistent with the hypothesis of guilt but inconsistent with any other rational hypothesis. Therefore, if you find in this case that the circumstantial evidence relied upon by the Government leads to two opposing and rational conclusions, one that the defendant Murray Schutz is guilty and the other that he is not guilty, it is your duty to adopt the conclusions that such defendant is not guilty and return a verdict finding the defendant Murray Schutz not guilty."

This instruction was requested on behalf of the other appellants by a reference to the appellant Schutz's proposed instruction. (Tr. 52.) The Court in the course of its instructions (Tr. 656-677, and 683) gave the following charge upon this subject, included at page 672 of the transcript:

> "Now, the evidence in proof of the conspiracy may be circumstantial. Where circumstantial

evidence is relied upon to establish a conspiracy, or any other essential fact, it is not only necessary that all the circumstances concur to show the existence of the conspiracy or fact sought to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion. That is, you are to consider all of the circumstances and conditions shown in evidence, and if it appears to you as reasonable men that, even though there is no direct evidence of the actual participation in the alleged offense by the defendants, or either of them, a reasonable inference from all of the facts and circumstances does to your minds, beyond a reasonable doubt, show that the defendants, or some of them, were parties to the conspiracy as charged, then you should make the deduction and find accordingly."

The appellant Schutz contends at page 3 of his Supplemental Brief:

> "* * * the main error was in the use of the phrase 'inconsistent with any other *rational conclusion'*, instead of the correct phrase 'inconsistent with every *reasonable hypothesis of innocence'*."

The record does not show that counsel called this claimed error to the attention of the Court below. *Rule 30 of the Federal Rules of Criminal Procedure* provides the opportunity for such objections to be made:

> "Rule 30.
>
> Instructions.
>
> At the close of the evidence or at such earlier time during the trial as the court reasonably di-

> rects, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

And it is to be noted that the Court followed this rule in allowing counsel to call any purported errors to its attention. The record contains numerous specific objections (Tr. 667-683), but at no point in that proceeding did any of counsel complain that the given words, "inconsistent with any other rational conclusion" had been given in place of the requested language, "inconsistent with any other rational hypothesis".

In Appellee's Brief, at page 46, we argued, and it is our present position, that the proposition that there is a prejudicial distinction between the request and the charge is without merit. As we there stated:

> "This argument is a study in hairsplitting semantics. A 'rational conclusion' can have no other meaning for the jury than the result of a 'reasonable hypothesis'. This is like defining the

> proper destination as one which is led to by the correct path, or the correct path as one which leads to the proper destination. The words are in either example two sides of the same shield. The instruction surely passes the ultimate test of its common sense meaning to the jury."

The requested instruction on circumstantial evidence by the appellants themselves demonstrates the interchangeable usage of these words. In that request, set forth above, the language shifts almost unnoticed and synonymously from "rational hypothesis" to "rational conclusions."

The appellants rely upon *Paddock v. United States* (C.C.A. 9), 79 F. (2d) 872, insofar as this point is concerned. The instruction in that case, however, is distinguishable from the one before this Court. There the pertinent part of the instruction, set forth at page 874 of the opinion, reads:

> "Evidence about circumstances, but this is the same with all circumstances, must at all times be consistent with guilt only and inconsistent with innocence, but since you are required to believe the defendant guilty beyond a reasonable doubt, it, so far as I can see, makes little difference what form of evidence you are relying upon."

At page 876 of the Paddock opinion, the Court commented:

> "We have said that this well-settled instruction in regard to the degree of proof required where circumstantial evidence is relied upon is merely another statement of the doctrine of reasonable

> doubt as applied to circumstantial evidence. It may therefore be true that 'no greater degree of certainty is required when circumstantial evidence is relied upon than where direct evidence is relied upon', as stated by the trial judge. The additional statement in the instruction that 'evidence about circumstances * * * must at all times be consistent with guilt only and inconsistent with innocence,' omits the qualifying and important phrase, 'inconsistent with every reasonable hypothesis of innocence,' and for that reason is an erroneous statement of the law."

It is obvious from this comment that the Court did not pass upon, or even consider, the use of the word "conclusion" instead of "hypothesis." The *Paddock* case was concerned with an instruction which told the jury to choose between the alternatives of innocence and guilt. The instruction failed to show in the language of the opinion, "the doctrine of reasonable doubt as applied to circumstantial evidence." It is, of course, a well settled rule of law that instructions are to be construed as a whole; and this doctrine further explains the contrast between the *Paddock* case and the present case. In the *Paddock* case, where the Court held that the doctrine of reasonable doubt was not applied to the rule of circumstantial evidence, the lower Court had erroneously instructed on that very doctrine of reasonable doubt. In this case, as contrasted to the *Paddock* case, there was neither a defective instruction on reasonable doubt, nor a parallel instruction on circumstantial evidence. Whatever

may be the merit of the *Paddock* case, it is no authority on its record for the reversal of this cause.

In the present case the instructions of the Court upon the doctrine of the application of reasonable doubt to circumstantial evidence as a basis for conviction was satisfied by the use of the language: "* * * but such circumstantial evidence must be inconsistent with any other rational conclusion."

It should be further noted that historically courts have used the words "reasonable conclusion" or "rational conclusion" in this same instruction in place of "reasonable hypothesis" or "rational hypothesis". *Garst v. United States* (C.C.A. 4) 180 F. 339. The very phrase used by the Court below, "inconsistent with any other rational conclusion," was approved by this Circuit Court in *Shepard v. United States* (C. C. A. 9) 236 F. 73. There is no prescribed formula for charging a jury upon circumstantial evidence, nor is it necessary that the Court employ any particular words or phrases so long as the instruction correctly states the rule so as to be understood by the jury. Although "hypothesis" is the most commonly used word in this connection, synonyms thereof may be substituted. Thus, it was held not error to employ the word "conclusion."

State v. Willingham, 33 La. Ann. 537, 89 A.L.R. 1380-1381.

See also:

People v. Nelson, 85 Cal. 421, 24 Pac. 1006.

The appellants, in response to an inquiry of this Court at the earlier hearing of this case, have discussed the decisions of Judge Learned Hand of the Second Circuit Court of Appeals holding that where the trial Court charges correctly on the doctrine of burden of proof, presumption of innocence, and upon the rule of reasonable doubt, no charge need be given on the question of circumstantial evidence.

Becher v. United States (C.C.A. 2), 5 F. (2d) 45;

United States v. Becker (C.C.A. 2), 62 F. (2d) 1007;

United States v. Arrow Packing Corp. (C.C.A. 2), 153 F. (2d) 669.

In the present case we need not extend the argument to the position of the Second Circuit. The jury was here properly instructed upon the subject of circumstantial evidence as well as the doctrine of reasonable doubt. In view of the full and ample protection given these appellants the only question raised by the line of cases decided by Judge Hand is an academic one: Whether in this case the appellants were not given more favorable instructions than the law requires.

II.

THE COURT PROPERLY INSTRUCTED THE JURY AS TO THE CEILING PRICE.

Maximum Price Regulation No. 445, 8 Fed. Reg. 11161, established a formula of cost plus 15% for the maximum price for a sale at wholesale of distilled spirits. The Court instructed in accord with this regulation (Tr. 667). All of the elements to establish the price were in evidence, the cost, the freight, and the tax (Tr. 471-473). The tax provision is further a matter of State law (Appellee's Brief, Appendix, p. viii). Appellants do not contend that no ceiling applied to the Old Marshall Straight Rye Whiskey, but only that the formula set forth in *Maximum Price Regulation 445* was not yet in effect at the time of the sales.

The trial Court applied the case of *Martini v. Porter* (C.C.A. 9), 157 F. (2d) 35, to the effect that the formula set up in *Maximum Price Regulation 445* may be used to determine whether there were violations of ceiling prices under the General Maximum Price Regulation. In this we agree.

However, there is further support for the use of this formula. The brief of the appellants Samuel and Brown is clearly misleading and inaccurate. At page 37, it states:

> "The formula which the jury was given was admittedly based on M.P.R. 445 (9 F.R. 4687). Section 5.10 of that regulation (later changed to Section 5.11) expressly states that the article of that regulation pertaining to maximum prices

> for wholesalers, the article containing the formula used in this case, 'shall apply to all sales * * * on and after August 30, 1943.' The transactions in this case took place around the first part or middle of August."

The fact is that the second sale to Picchi by the appellant Saul Samuel took place after August 30, 1943, and within the effective date of the regulation itself (Tr. 285, 286). This is corroborated by Schutz's 52-B form (U.S. Exhibit 5) showing a delivery to Picchi on September 18, 1943. It is obvious that the Court properly instructed the jury, and the only question that can be raised by the appellants is whether there should have been a distinction drawn by the Court as to the earlier and the later sales.

We submit that there was clear evidence of the intent to violate on the part of the appellants. This must be measured by their own use of invoices corresponding to the formula ceiling price and the collection of the side money in cash. The entire record indicates no prejudice to them because of the Court's instructions. Were they, however, to show any lack of perfection with regard to the instructions on these regulations, it would seem that the proof of the tax and permit features of this case in all their overwhelming force would deprive them of a showing of such prejudice.

If there were any irregularity in the trial Court's instruction upon the O.P.A. phase of this case, we should then be faced with this question: *Where de-*

fendants are charged with a conspiracy to violate several laws of the United States and the Court erroneously instructs upon one of these laws, should a general verdict of "guilty" be reversed?

There is a persuasive line of authority supporting the contention that the conviction be upheld. The rule is well settled that where an indictment charges a conspiracy to violate several laws of the United States and the proof as to one of these objects is insufficient, the conviction will be upheld upon a general verdict of guilty, provided that proof as to any of the objects is sufficient.

Kepl v. United States (C.C.A. 9), 299 F. 590; cert. den. 266 U.S. 617;

McDonnell v. United States (C.C.A. 1), 19 F. (2d) 801;

McWhorter v. United States (C.C.A. 5), 62 F. (2d) 829.

Each of these three cases was previously cited by the appellee at page 40 of its brief. Appellant Schutz has replied that in each case there was no motion to withdraw any portion of the indictment from the consideration of the jury. This latter statement is not a full consideration of the matter; the cases do not affirmatively state that a motion was made to withdraw part of the indictment. However, we can not assume that the argument was in each case considered upon a faulty record. The only sound belief in any situation where the record discloses no waiver of rights is

that the Court was considering a matter properly before it.

In addition to the above authority, this analogous rule is stated in the following cases:

Anstess v. United States (C.C.A. 7), 22 F. (2d) 594;

Hogan v. United States (C.C.A. 5), 48 F. (2d) 516;

Christiansen v. United States (C.C.A. 5), 52 F. (2d) 950;

Andrews v. United States (C.C.A. 4), 108 F. (2d) 511;

Short v. United States (C.C.A. 4), 91 F. (2d) 614;

Safarik v. United States (C.C.A. 8), 62 F. (2d) 892;

Baker v. United States (C.C.A. 2), 61 F. (2d) 469.

See, also,

Ford v. United States (C.C.A. 9), 10 F. (2d) 339, 273 U.S. 593.

The position of the accused in those cases following the *Kepl* case where there is insufficient evidence as to one object of the conspiracy is the same as the position of the appellants here. In either situation the jury might have reached its general verdict of guilty with regard only to that object of the conspiracy which was not properly submitted to it (either for lack of sufficient evidence or because of an improper

instruction). In either situation the jury, despite its general verdict of guilty, may have rejected the evidence as to those objects properly submitted to it. Yet there is no presumption against the legality of the general verdict of guilty in the cited cases dealing with an insufficiency of evidence as to one object of the conspiracy—and no reason is present to invoke any such rule here.

Counsel for the appellant Schutz argues at page 28 of his supplemental brief that the present case does not come within the pattern of those cases following *Kepl v. United States,* supra, because in that situation the jury must be presumed to find "guilty" as to the object on which there is sufficient evidence, and "not guilty" on the issue as to which there is insufficient evidence. This argument must be flatly rejected. There is no presumption that the jury can determine the question of the legal sufficiency of evidence as to any issue. That is a matter of law, and one which this honorable Court is called upon to decide time and again. The experience of this Court, and the history of appellate procedure runs against any such novel belief. The very submission of the case to the jury is itself an instruction that the evidence, if believed, is sufficient for conviction. We can not presume that the jury rejects this implicit instruction.

CONCLUSION.

On the basis of the arguments hereinabove set forth, and upon those set forth earlier in the Brief of the Appellee, it is submitted that there is no prejudicial error in this case and that the judgment of conviction below should be affirmed.

Dated, San Francisco, California,
December 3, 1947.

Respectfully submitted,

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